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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-956

LISTON PACK, Pastor of the Holiness Church of God in Jesus Name, et al.,
Petitioners,

v.

STATE OF TENNESSEE, ex rel. Henry F. Swann, District Attorney General,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

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Respondent.

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The Petitioners pray that a writ of certiorari issue to review the judgment of the Tennessee Supreme Court entered in this cause on September 8, 1975.

OPINIONS BELOW

The opinion of the Circuit Court for Cocke County, Tennessee, is unreported. (Technical Record, pp. 21-22) The opinion of the Tennessee Court of Appeals is unreported. (See Appendix, pp. 3a-22a) The opinion

of the Tennessee Supreme Court is officially reported at 527 S.W. 2d 99.

JURISDICTION

The judgment of the Supreme Court of Tennessee was made and entered on September 8, 1975. A copy is appended to this petition in the Appendix at pp. 23a-49a. The time for filing this petition was extended by Mr. Justice Steward to and including ~~December 20~~ January 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the prohibition against petitioner's handling poisonous snakes and drinking poison as a part of their worship service, when the primary risk of harm is only to the handler of the snake and the consumer of the poison, violates the free exercise clause of the First Amendment and a constitutionally protected right of privacy.

STATUTES INVOLVED

The pertinent portions of Tennessee Code Annotated, Section 39-2208 are set forth in the Appendix at p. 5a.

STATEMENT OF THE CASE [1]

This case arises from an attempt by the State of Tennessee to enjoin members of the Holiness Church of God in Jesus Name from handling snakes and drinking poison as a part of their worship service.

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[1] The facts are taken verbatum from the opinion of the Tennessee Court of Appeals, at pages 6 and 7 and are found in the Appendix at pages 7a-8a.

The petitioners are members of a Church situated at the end of an unimproved private mountain road at a point one-half mile from the nearest paved road. The State's witness, an agent of the Tennessee Bureau of Investigation, testified that he attended the Church on August 1 and August 4, 1973. At the August 1 service no snakes were used. On August 4 the Church was filled. Defendant Pack, the congregation's minister, warned persons in attendance not to come forward and participate in snake handling unless they felt moved by the spirit and that the time for their participation was right. During the service defendant Pack removed from beneath the rostrum a brown wooden box, to which was appended a lock, and placed it on a bench beside the rostrum. He took from it a diamond back rattle snake four and a half or five feet in length, held it briefly, and returned it to the box, which he then placed atop the rostrum. Later, defendant Ball removed the snake and handled it. Once, according to the State's witness, he nearly dropped it. An unidentified women who had been singing behind the rostrum took the snake from Mr. Ball. Subsequently, an elderly man, Charlie Powers, also held it. None were bitten.

The activity in question consumed no more than two to four minutes of the one and a half hour worship service. No general invitation to participate was given, and only four persons were "moved" to take up the snake. It was never taken into the congregation, but was handled only in the area between the front row of pews and the rostrum, a space of about ten feet. Among the persons seated in the front row were children. No other person entered the area while the snake was outside the cage, but at times during the service children walked unattended in the aisles. The State's witness,

seated midway back in the congregation, testified that whenever the reptile was removed from the box he felt he might be in some danger. The evidence of three witnesses for the defense was stipulated. The testimony of an anthropologist, who had attended services at which snakes were used, was that precautions were always taken not to jeopardize other persons, that she had never seen a non-participant in danger, and had not seen anyone other than a "designated Church representative" handle a snake. The testimony of two other persons was also to the effect that they perceived no danger to other persons.

As the result of a petition filed by the State of Tennessee to enjoin the petitioners from handling snakes or drinking poison in their Church service, an answer was filed challenging the right of the State of Tennessee to seek such absolute relief on constitutional grounds by stating: "To enjoin the defendants would violate their constitutional rights of privacy and religion." (Technical Record, p. 20) The trial court dismissed these contentions and permanently enjoined the petitioners from handling snakes, but permitted them to drink poison as long as they did not pass it on to any other persons. (Appendix, pp. 1a-2a) An appeal was prosecuted to the Tennessee Court of Appeals wherein the petitioners contended in their Assignments of Error that:

II

The Court erred by holding that Tennessee Code Annotated, Section 39-2208 does not constitutionally enfringe upon the defendant's First Amendment rights.

III

The Court erred by holding that Tennessee Code Annotated, Section 39-2208 and the action of the

> State constitutionally enfringed upon the defendant's right of privacy.

The Tennessee Court of Appeals modified the injunction against snake handling by stating at page 21 of the opinion (App., *infra*, p. 20a):

> It is the opinion of this Court that the injunction heretofore issued by the trial court is unconstitutional and broad. It should be modified to read, "The defendants, Liston Pack and Alfred Ball, are permanently enjoined from handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to the exposure to such danger .

A dissent filed in the Court of Appeals stated "that the First Amendment of the United States Constitution and Article I, Section 3, of the Constitution of Tennessee, guaranteed to all citizens the right to freedom of worship. However, such constitutional right may not be exercised in a manner so as to cause injury and harm to others." (Appendix, p. 22a)

The Tennessee Supreme Court granted a writ of certiorari to review the opinion of the appellate court and on September 8, 1975, held (App., *infra*., p. 47a):

> Irrespective of its import, we hold those who publically handle snakes in the presence of other persons and those who are present aiding and abetting are guilty of creating and maintaining a public nuisance. Yes, the State has the right to protect a person from himself and to demand that he protect his own life. 527 S.W. 2d, 99, at 113.

With that, the Tennessee Supreme Court broadened the injunction issued by the trial court and prohibited the

drinking of poison even though the Court readily recognized "the fact that the decision we have reached imposes stringent limitations upon the pursuit of a religious practice, a result we endeavored to avoid." 527 S.W. 2d, 99, at 114. (App., *infra*, p. 48a).

REASONS FOR GRANTING THE WRIT

The decision of the Tennessee Supreme Court presents to this Court its first opportunity to consider the extent to which a state may invade the freedom of religious exercise on the ground that a particular practice, which is an intimate part of a religious service, endangers the health and safety of a voluntary adult participant.

1. The Tennessee Supreme Court held that although the petitioners' practice of handling poisonous snakes is an intricate part of their method of worship, it is none the less a public nuisance and, as such, is beyond the protection of the free exercise clause of the First Amendment of the United States Constitution, even when the snake handling is done in a manner to create a risk only to the handler. This case presents a unique factual situation that would, for the first time, permit this court to decide the extent to which the free exercise clause of the First Amendment limits a state's power to enjoin a person from engaging in an individual act of worship in a religious service.

2. The Tennessee Supreme Court held that a state can prohibit an individual's free exercise of religion if the activity presents a danger to the participant. In previous free exercise cases decided by this Court, the state's power to regulate has been founded upon a conflict between an individual's right of free exercise of his religion and the state's authority to protect the

safety, morals, health and welfare of other members of society. *Cantwell* v. *State of Connecticut,* 310 U.S. 296 (1940); *Barnette* v. *West Virginia Board of Education,* 319 U.S. 64 (1943). This decision presents to the Court its first opportunity to decide whether a state can prohibit an individual from participating in a portion of a worship service simply to protect that participant from the risk voluntarily and knowingly created by himself.

3. The Tennessee Supreme Court decreed an absolute prohibition of the petitioners' religious practice of handling poisonous snakes as part of their worship service when the state's only legitimate interest could have been protected by means less restrictive of the petitioner's right to freely exercise their religion. Prior decisions of this Court allow a state to protect its compelling interest only by the means least restrictive of the free exercise guarantee. *Kusper* v. *Pontikes,* 94 S. Ct. 303, (1973). In the absence of an opinion by this court in this case, the decision of the Tennessee Supreme Court will become a leading, although erroneous, statement of constitutional law in an important and developing area affecting the freedom of religious exercise.

4. In seeking to protect the state's interest in preserving a healthy citizenry, the Tennessee Supreme Court denied the petitioners' their constitutionally guaranteed right of privacy to control their own bodies while engaged in the exercise of their religious belief. The present case will permit the Court to further define the meaning and application of a constitutional right of privacy, particularly as it applies to persons engaged in the exercise of a religious belief. *Roe* v. *Wade,* 410 U.S. 113, (1973).

CONCLUSION

The first Amendment issue presented by this case is one never decided previously by this Court. It is of such magnitude that it can be appropriately settled only by this Court. None of the free exercise cases previously decided involve a state court's decision that an individual's chosen method of worship constituted a public nuisance and could be permanently and absolutely enjoined. The constitutional question of the extent to which the state may enjoin an individual from engaging in a particular method of worship is nationwide in scope and one that is fundamental to First Amendment freedoms. Coupled with a proposed application of the developing law of a constitutional right of privacy, an opinion in this case would influence the continued development of constitutional law and interpretation. For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Cooperating Attorneys
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OPINION OF THE TRIAL COURT

APPENDIX

IN THE CIRCUIT COURT OF COCKE COUNTY, TENNESSEE

STATE OF TENNESSEE, on the relation of Henry F. Swann, District Attorney General of the Second Judicial Circuit of Tennessee

v.

LISTON PACK, Pastor of the Holiness Church of God in Jesus' Name and ALFRED BALL

Final Decree

This cause came on to be finally heard before the Honorable George R. Shepherd, Judge, on September 27, 1973, upon the original petition and the entire record in the cause, argument of counsel, and especially upon the oral proof introduced in open Court, from all of which the Court adjudges and decrees as follows:

I.

That the defendant Liston Pack, Pastor of the Holiness Church of God in Jesus Name and Alfred Ball, a member of said church, have been violating the laws of Tennessee in the said Holiness Church of God in Jesus' Name in that they handle and display dangerous and poisonous snakes in violation of Section 39-2208, which section is as follows:

> "It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person."

In this cause the Court, on April 21, 1972, granted a temporary injunction against said defendants enjoining and restraining them from handling dangerous and poisonous snakes in any church service being conducted in or about

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said church or any other place in Cocke County, Tennessee. And the Court further finds that said defendants, Liston Pack and Alfred Ball, have stated that they will continue to handle said dangerous and poisonous snakes in Cocke County, Tennessee. The Court finds that the handling of said dangerous and poisonous snakes is in violation of TCA 39-2208 and that said practice is done in the presence of children and other people attending church services at the said Holiness Church of God in Jesus Name.

II

In this cause the Court heretofore granted a temporary injunction restraining the said Liston Pack and Alfred Ball from handling and displaying dangerous and poisonous snakes at the Holiness Church of God in Jesus Name. It is therefore ordered, adjudged and decreed that the defendant, Liston Pack, Pastor of said Church and Alfred Ball, a member thereof, be perpetually enjoined from handling, displaying or exhibiting dangerous and poisonous snakes at the said Holiness Church of God in Jesus Name or at any other place in Cocke County, Tennessee.

Cost of this cause is taxed against the defendants for which execution is awarded.

To all of this the Defendants object and pray an appeal that is granted.

/s/ Geo. R. Shepherd
Judge

Approved for entry:
Edward Michael Ellis
T. J. Emison, Jr.
For
Henry F. Swann
District Atty.

OPINION OF THE COURT OF APPEALS

IN THE COURT OF APPEALS FOR TENNESSEE
EASTERN SECTION

STATE OF TENNESSEE, on the relation of HENRY F. SWANN, District Attorney General, Second Judicial Circuit
Appellee

v.

LISTON PACK, Pastor of the Holiness Church of God in Jesus Name, and ALFRED BALL
Appellants

COCKE LAW

MODIFIED and REMANDED
HON. GEORGE R. SHEPHERD, *Judge*

EDWARD MICHAEL ELLIS OF KNOXVILLE and THEO J. EMISON, JR., OF ALAMO FOR APPELLANTS

HENRY R. SWANN, DISTRICT ATTY. GEN., and WILLIAM C. KOCK, JR., ASSISTANT STATE ATTORNEY GEN. FOR APPELLEE

Opinion

DROWOTA, J.

Appellants, the minister and a deacon of the Holiness Church of God in Jesus Name, were permanently enjoined by the Circuit Court for Cocke County from "handling, displaying, or exhibiting dangerous and poisonous snakes at the said . . . church . . . or at any other place in Cocke County, Tennessee." This Court is called upon to determine whether the State has authority to prohibit defendants' conduct and, if so, to what extent restrictions on that authority may be created by the Constitution of the United States and of the State of Tennessee.

It is an article of faith in appellants' church that certain "signs shall follow them that believe: In my name shall they cast out devils; they shall speak with new tongues;

they shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick and they shall recover." Mark 16:17-18 [King James]; Articles of Faith, Ex. 5. These words, said to have been spoken by Jesus after the Resurrection and immediately before the Ascension, are considered a command.[1] Appellants believe that the "Holy Spirit" "anoints" certain persons and "moves" them to handle serpents, and that through this activity the "Holy Spirit" uses them to confirm the words of Jesus Christ to non-believers. Consequently, snake handling has been a long standing tradition in appellants' church.

Snake handling as a religious practice has other Biblical roots as well. In the Garden of Eden the serpent was a symbol of evil to be conquered.[2] In the Wilderness serpents bit the children of Israel and they died; not until Moses raised a brazen serpent on a pole and those bitten looked upon the symbol were they saved. Mark 16:17-19 forms the foundation for exorcism, speaking in tongues, snake handling, the drinking of deadly poison, and the laying on of hands for healing by various religious groups. Thus, it may be noted that the theology of appellants' con-

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[1] It may be observed that only with respect to four of the five "signs" in Mark 16:17-18 is the command "shall" used; with respect to the drinking of deadly poisons the word "if" is employed. Pelton and Carden, Snake Handlers, 105-110 [1974]; W. LaBarre, They Shall Take Up Serpents, 11 [1962]. Consequently, the latter practice appears to be less common among fellowships founded on this scripture. See Pelton and Carden, *supra*.

[2] Some snake handling groups, focusing on this symbolic aspect of the practice, treat it as a test of the faith of the believers. See e.g. *Harden* v. *State*, 188 Tenn. 17, 216 S.W.2d 708 [1949]. Defendant-appellants, denying that their use of snakes serves such a purpose, emphasize its value as a means of conversion. The taking up of the serpent is involuntary, they earnestly point out, in the sense that they become "anointed" and serve as the instruments of the "Holy Spirit" speaking to man.

gregation is not unique. The sect of which it is a part owes its apparent origin in this century to a group founded in 1909 at Sale Creek, Tennessee. From there the practice spread first to Kentucky and then throughout the South and elsewhere. It was not until the 1940's however, that snake handling began to achieve widespread public attention.[3] For more recent treatments of the groups see R. W. Pelton & K. W. Carden, *Snake Handlers* [1974]; R. K. Holliday, *Tests of Faith* [1966]; W. LaBarre, *They Shall Take Up Serpents* [1962]. As the congregations gained notoriety, practice of their religion became more difficult. Police raids on their church services, seizure of their snakes, and arrests of their leaders were not uncommon. See W. LaBarre, *They Shall Take Up Serpents, supra* at 24-43. Several states, including Tennessee, outlawed the handling of snakes. See, e.g., TCA § 39-2208 [1956] [enacted 1947]; N.C. Gen. Stat. §§ 14-416 et seq. [1969] [enacted 1949]; Va. Code Ann. § 18.1-72 [1960] [enacted 1950]; Ala. Code Tit. 14, § 419(2) et seq. [1953] [enacted 1950]; Ky. Rev. State. § 437.060 [1971] [repealed 1972]. The activities of appellants too have not gone unnoticed.[4] On October 30, 1970, for example, they were tried and convicted with others of violating T.C.A. § 39-2208, which prohibits the handling of poisonous snakes "in such a manner as to endanger the life or health of any person."

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[3] See, e.g., J. B. Collins, *Tennessee Snake Handlers* [undated]; Kerman, "Rattlesnake Religion," in *Eve's Stepchildren: A Collection of Folk Americana*, 93-102 [L. Jones ed. 1942]; J. Thomas, *Blue Ridge Country*, 164 et seq. [1942]; Baird, "They Shall Take Up Serpents," *Woman*, Vol. 17, No. 2, 36-39 [1946]; Barbour, "The Reptiles of Big Black Mountain, Harlan, Kentucky," Copeia, No. 2, 100-107 [1950]; B. C. Clough, *The American Imagination at Work: Tall Tales and Folk Tales* 156 [1947]; N. Callahan, Smoky Mountain Country 91 [1952]; 2 L. M. Klauber, *Rattlesnakes* 945-947 [1956]; Schwartz, "Ordeal by Serpents, Fire and Strychnine," Psychoanalytic Quarterly, Vol. 34, 405-429 [1960].

[4] See, e.g. Pelton & Carden, *supra*.

On April 7, 1973 a participant in the snake handling in appellants' church was bitten on the hand but suffered no ill effects other than the swelling of his hand. On the same occasion, appellant Liston Pack's brother, Buford Pack, and another member of the congregation, Jimmy Williams, drank from a glass of strychnine Williams had brought to the church. Both subsequently died, after refusing medical treatment. Six days later the State of Tennessee, on the relation of the District Attorney General of the Second Judicial Circuit, petitioned the Circuit Court for Cocke County for a temporary and permanent injunction prohibiting defendants from handling, displaying, or exhibiting poisonous snakes or taking or using strychnine or other poisons. In the alternative it asked that the church be padlocked if defendants did not cease and desist from the enjoined activities. On April 21 the Circuit Court granted a temporary injunction prohibiting defendants from handling poisonous snakes in any church service in Cocke County. It provided, however, that "any person who wishes to swallow strychnine or other poison may do so if he does not make it available to any other person."

Subsequently, at religious services held in contravention of the injunction, one snake handler, Murl Bass, was bitten and hospitalized. In early July, 1973 the District Attorney General petitioned the court, asking that an attachment issue for defendants requiring them to appear and show cause why they should not be incarcerated or fined for contempt of court. Following a hearing on July 28, 1973 the court found defendants guilty of violating the injunction. Liston Pack was fined $150 and sentenced to thirty days confinement in the Cocke County Jail. Alfred Ball was fined $100 and sentenced to twenty days incarceration. Both sentences were suspended, however, until such time as the injunction might again be violated. On August 18, 1973 the court found that neither defendant had paid his fine and ordered that they be confined in the Cocke County Jail until payment and that they appear before the court

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to show cause why they should not serve their respective sentences. The fines were paid after defendants had spent four days in jail. A final hearing on the original petition and entire record in the cause was held on September 27, 1973. Finding that defendants had been handling dangerous snakes in violation of T.C.A. § 39-2208 and that the practice was carried on in the presence of children and other persons attending services at the church, the court made its injunction permanent. A decision on whether defendants will be required to serve their jail sentences was deferred, pending this appeal.[4] Although the final decree does not use the term public nuisance, it is clear from an examination of the record that the trial court and all the parties understood that the injunction was based on a finding that defendants' activities constituted a public nuisance.[5]

The evidence in the record may be summarized as follows. Worship services are conducted at the Holiness Church of God in Jesus Name on Wednesdays, Saturdays, and Sundays. The church is located on a tract of land owned by the church and lies approximately one half mile from the nearest paved road at the end of an unimproved private mountain road belonging to the congregation. The building is small, accommodating approximately one hundred people. The State's witness, an agent of the Tennessee Bureau of Identification, testified that he attended the church on August 1 and August 4, 1973. At the August 1 service no snakes were used. On August 4 the church was filled. Defendant Pack, the congregation's minister, warned persons in attendance not to come forward and

[5] The State's complaint likewise does not make the reliance on the public nuisance remedy explicit, but the record clearly reflects that all the parties understood the grounds of the action. The record contains numerous references at the hearings in this cause to its nuisance basis (Bill of Ex. Aug. 25, 1973, p. 5, Sept. 25, 1973, pp. 3, 5-7) and the case is so treated in the parties briefs before this Court.

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participate in snake handling unless they felt moved by the Spirit and that the time for their participation was right. During the service defendant Pack removed from beneath the rostrum a brown wooden box, to which was appended a lock, and placed it on a bench beside the rostrum. He took from it a "diamond back" rattlesnake four and a half or five feet in length, held it briefly, and returned it to the box, which he then placed atop the rostrum. Later, defendant Ball removed the snake and handled it. Once, according to the State's witness, he nearly dropped it. An unidentified woman who had been singing behind the rostrum took the snake from Mr. Ball. Subsequently, an elderly man, Charlie Powers, also held it. None were bitten.

The activity in question consumed no more than two to four minutes of the one and a half hour worship service. No general invitation to participate was given, and only four persons were "moved" to take up the snake. It was never taken into the congregation, but was handled only in the area between the frontmost row of pews and the rostrum, a space of about ten feet. Among the persons seated in the front row were children. No other person entered the area while the snake was outside the cage but at times during the service children walked unattended in the aisles. The State's witness, seated midway back in the congregation, testified that whenever the reptile was removed from the box he felt he might be in some danger. The evidence of three witnesses for the defense was stipulated. The testimony of an anthropologist, who had attended services at which snakes were used, was that precautions were always taken not to jeopardize other persons, that she had never seen a nonparticipant endangered, and had not seen anyone other than a "designated church representative" handle a snake. The testimony of two other persons was also to the effect that they perceived no danger to other persons.

Given these circumstances we must determine first whether the State has authority to act, and second, if so, whether the power is circumscribed by constitutional restrictions. Defendants' snake handling is made illegal by T.C.A. § 39-2208. It is well established, however, that an act is not, *ipso facto*, a nuisance because it has been made criminal by statute. *Hagaman* v. *Slaughter*, 49 Tenn. App. 338, 354 S.W.2d 818 [1961]; 66 C.J.S. Nuisances § 9 [1950]. Conversely, the mere fact that the act constituting the nuisance is also a crime does not oust jurisdiction in equity. *Id.*; *Weakley* v. *Page*, 102 Tenn. 178, 53 S.W. 551 [1899]. It is frequently said that all public nuisances are crimes. See, e.g., W. Prosser, *The Law of Torts* §§ 86, 88 [4th Ed. 1971]. What is meant is that, at common law, a public nuisance is punishable as a crime, not that all crimes are public nuisances. Legislatures may make an act criminal and also provide that it may be abated as a public nuisance; or an act may be designated a public nuisance without also providing statutorily for a criminal sanction. Within constitutional limitations such legislative declarations are conclusive, and will preclude judicial inquiry into the reasonableness of the conduct. Prosser, supra, § 87 at 583. In the absence of a legislative declaration that an act is a nuisance the act must be abatable at common law if at all. To warrant an injunction where a nuisance is also a crime there must be proof of what the law denominates a nuisance as distinguished from a crime. *Dean* v. *State*, 151 Ga. 371, 106 S.E. 792, 40 A.L.R. 1132 [1921]; *State ex rel. Stewart* v. *Dist. Ct.*, 77 Mont. 361, 251 P. 137, 49 A.L.R. 627 [1926]; *Commonwealth* v. *Smith*, 266 Pa. 511, 109 A. 786, 9 A.L.R. 922 [1920].

An exacting, comprehensive definition of a nuisance is not possible, for the concept describes not an act, but a result. Few terms, it has been said, "have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plain-

tiff's interests is characterized as a 'nuisance,' and there is nothing more to be said." Prosser, supra § 86 at 571. A nuisance properly "has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion." *Id.*, § 87 at 573. The essence of a nuisance, then, is actual or threatened harm to others. A private nuisance is an interference with another's use of his land. A public nuisance must affect an interest common to the public, as opposed to the one peculiar to one or more individuals. The entire community need not be affected, however, so long as the activity or circumstance interferes with those who come in contact with it in the exercise of a public right. The property on which the church is located is secluded and owned by the congregation and defendants' activity therefore cannot be said to constitute a private nuisance. Strictly speaking, visitors to the church are licensees, or perhaps invitees, but such persons may be said to be exercising a public right in attending worship services, inasmuch as the services have been opened to the public.

A nuisance extends, *inter alia*, to everything that endangers life or health, *Yarbrough* v. *Louisville & Nashville Ry. Co.*, 11 Tenn. App. 456, 466 [1930], and the State has authority at common law to abate such dangers. *State ex rel. Thompson* v. *Dixie Finance Co.*, 152 Tenn. 306, 321, 278 S.W. 59 [1925].

The proof in this case demonstrates that some care is taken to avoid injury to nonparticipants. There is no indication that an on-looker has ever been bitten. We find that the only danger to nonparticipants is the possibility that a snake might be dropped and escape into the congregation. We cannot know how likely such an accident may be, but the eventuality cannot be ignored. The inherent danger of the circumstance is such as to justify exercise of the State's authority to protect the public.

Under the law of nuisance it does not, however, justify an absolute ban on defendants' conduct. Where a party injures, or threatens injury, only to himself and does not injure or disturb the public, his activity cannot be prohibited under a nuisance rationale. The Circuit Court implicitly recognized this principle when it refused to enjoin the drinking of poison where it was not made available to other persons. Defendants' snake handling constitutes a nuisance only when done in a manner in which nonparticipants may be endangered, and is enjoinable only to that extent. Tennessee Courts have consistently held that an activity should not be prohibited outright unless it clearly appears that it cannot be carried on in such a manner as not to create a nuisance, and that the remedy must be carefully limited to that which is necessary to avoid the injury. *Wright* v. *State*, 130 Tenn. 279, 170 S.W. 57, 58 [1914]; *Crabtree* v. *City Auto Salvage Co.*, 47 Tenn. App. 616, 340 S.W.2d 940 [1960]; *Hagaman* v. *Slaughter, supra.*

We can envision a number of relatively minor physical modifications of the interior of the church that would likely provide adequate protection to on-lookers. The handling might be restricted to a glass or fine mesh wire enclosure; or a short wall of the type found in some courtrooms might be constructed to separate the congregation from the area in which the activity takes place. Which of these or other precautions would in fact be sufficient would be a finding of fact to be made by the Circuit Court. Once satisfied as to the safety of those not involved in the snake handling, the State has satisfied the only interest it has at stake in a nuisance action.

This result is indicated not only by the law of nuisances, it is constitutionally mandated. Even where the State otherwise has authority to act, its power may be limited by special constitutional restrictions designed to safeguard other state and individual interests. The constitutional caveat that Congress shall

make no law prohibiting the free exercise of religion applies to the States as well. *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 [1940]. The Tennessee Constitution provides that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; . . . that no human authority can, in any case whatever, control or interfere with the rights of conscience . . ." Art. 1 § 3.

This guarantee is "practically synonymous" with the religion clause of the first amendment to the Constitution of the United States. To the extent it differs, it is "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience" than the first amendment. *Carden* v. *Bland,* 199 Tenn. 665, 288 S.W.2d 718, 721 [1956].

The State argues that while the right to freedom of religious belief is absolute, religiously inspired conduct may be prohibited because it is not protected by the first amendment. While conduct may be regulated or proscribed in appropriate circumstances, the contention that it is per se outside the protective ambit of the first amendment was expressly rejected in *Wisconsin* v. *Yoder,* 406 U.S. 205, 220, 92 S.Ct. 1526, 32 L.Ed.2d 15, 27-28 [1972]. Liberty of belief is an empty right unless physical expression of it is allowed, and the Tennessee Constitution, like its federal counterpart, encompasses conduct within its shelter. A case therefore does not become easier because a defendant engages in conduct as well as belief, *id.,* and the label "action" cannot be a shibboleth automatically requiring any given result. Courts may not define away first amendment concerns, *Procunier* v. *Martinez,* 40 L.Ed.2d 224, 239, — U.S. —, 94 S.Ct. 1800 [1974], but must apply the appropriate constitutional analysis to the activity, whatever it may be called.

It is well settled under the federal constitution that a significant encroachment upon a fundamental right or in-

terest cannot be justified upon a mere showing that the means used rationally promote a legitimate state interest. *Kusper* v. *Pontikes*, 38 L.Ed.2d 260, 267, — U.S. —, 94 S.Ct. 303 [1973]. Freedom of religion, like other first amendment liberties, is such a right. An action will withstand constitutional scrutiny only upon a clear showing that it protects a state interest that is *compelling*, *Sherbert* v. *Verner*, 374 U.S. 398, 406-409, 10 L.Ed.2d 965, 83 S.Ct. 1790 [1963]; *United States* v. *Jackson*, 390 U.S. 570, 582-583, 20 L.Ed.2d 138, 88 S.Ct. 1209 [1968]; *Shapiro* v. *Thompson*, 394 U.S. 618, 634, 22 L.Ed.2d 600, 89 S.Ct. 1322 [1969], and that no means less restrictive of the fundamental right or interest will adequately protect the compelling governmental concern involved. *Kusper* v. *Pontikes*, *supra*, at 268; *Shelton* v. *Tucker*, 364 U.S. 479, 488, 5 L.Ed.2d 231, 81 S.Ct. 247 [1960]; *Procunier* v. *Martinez*, *supra*. See Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 [1969]. For even when pursuing a legitimate interest, the State may not select methods that restrict constitutionally protected liberty more than is necessary. *Dunn* v. *Blumstein*, 405 U.S. 330, 343, 31 L.Ed. 2d 274, 92 S.Ct. 995 [1972]. In areas closely touching our most precious freedoms, "precision of regulation must be the touchstone." *NAACP* v. *Button*, 371 U.S. 415, 438, 9 L.Ed.2d 405, 83 S.Ct. 328 [1963].

The conclusion that a government interest is compelling requires strict scrutiny of both the interest itself and the nature of the threat to it. First, the Court must find that the interest is both legitimate and essential to the maintenance of society in a civilized, free state; and, that on balance, and giving full consideration to the very strong societal as well as individual interests promoted by the constitutional safeguard, the liberty must be burdened to accommodate that interest. Second, where the interest has not already been invaded and the harm has yet to occur, the State must overcome the strong presumption against its punishment of, or restriction on, the defendant by

demonstrating by the most clear and convincing evidence that (a) the defendants' conduct creates a danger of substantial invasion of the interest and (b) the happening of the injury is *imminent*. This exacting standard is appropriate here, as in other first amendment or Art. 1 § 3 cases, because in reconciling governmental interests with religious liberty every possible leeway must be given to the claims of religious faith. *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 [1940], rev'd on other grounds, *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 [1943]. The protection of constitutional values is the first duty of this and every court.

The State's burden of proof is great indeed, but we find that it has been met in this case. This being a suit to abate a public nuisance, the state interest involved is the protection of persons exposed to defendants' activities. Few governmental concerns will be compelling in the constitutional sense, but we find this interest to be both legitimate and overriding. The protection of human life is one of the principal reasons for the creation and maintenance of organized government, and is inferior to none in the hierarchy of legal values. It is admitted that the reptiles used in defendants' religious services are poisonous and potentially deadly. Because of the close proximity of nonparticipants to the snakes and the failure to take physical precautions against the possibility of accidental injury to them, the danger must be considered imminent. It is clear that some limit may be placed on the free exercise of one's religion where physical harm to another is likely. See e.g., *Jehovah's Witnesses* v. *King Co. Hosp.*, 390 U.S. 598, 20 L.Ed.2d 158, 88 S.Ct. 1260 [1968], in which the Court summarily affirmed a lower court decision authorizing compulsory blood transfusions for children of Jehovah's Witnesses even though the parents objected on grounds of religious belief.

The constitutional inquiry does not end here, however. The extent to which the constitutional right of defendants must be burdened to protect other persons attending the church must still be determined. We find that the State has available to it less drastic means of satisfying its interest than the broad decree made by the lower court, and that constitutionally it thus may not broadly stifle the exercise of religious freedom by prohibiting entirely defendants' conduct. See page 10, *supra*.

We are not unmindful that in 1948 the Tennessee Supreme Court in *Harden* v. *State*, 188 Tenn. 17, 216 S.W. 2d 708, found T.C.A. § 39-2208 to be constitutional. See also *Lawson* v. *Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 [1942]; *Hill* v. *State*, 38 Ala. App. 404, 88 So.2d 880 [1956]. *Harden* has no direct application to this case, however. We deal not with a criminal conviction under T.C.A. § 39-2208 but with an injunction against an alleged public nuisance. While the statute may have persuasive value as to whether defendants' actions constitute a public nuisance, in the sense that it represents a legislative finding that such activity is dangerous, it is not controlling, as has been indicated, as to the existence *vel non* of a nuisance. Strictly speaking, the question of its constitutionality is not before us.

Furthermore, even had we found that under nuisance law defendants' practice could be enjoined entirely, *Harden* could not have been dispositive of the issue of the constitutional restraints on that power. Just as the Tennessee Supreme Court is the final arbiter of the meaning of the state constitution, the United States Supreme Court determines conclusively the meaning of the federal constitution. While it has not ruled on the exact question posed in *Harden* and in this case, its decisions subsequent to *Harden* have removed the theoretical underpinnings on which the decision was based. State courts not only are bound by the results reached on federal constitutional

issues by the U. S. Supreme Court, we are bound to a considerable extent as well by the analytic method the Court concludes must be utilized in determining such questions. While it is possible that the result reached in *Harden* might be reached by the U. S. Supreme Court today, it is altogether self-evident that under modern constitutional theory that legal conclusion could not be justified using the analytic methods employed by the *Harden* Court.[6] It is thus necessary that the issue be freshly examined in the light of the recent constitutional authority ultimately binding upon us.

The *Harden* decision was premised on the subsequently rejected belief-action dichotomy in free exercise cases, requiring merely a rational relationship between restrictions on religious conduct and the State interest served by the restrictions. Compare *Cantwell* v. *Connecticut, supra,* with *Wisconsin* v. *Yoder, supra.* As already indicated, if a fundamental right or interest is involved such constraints are now subject to strict scrutiny of the nature of the governmental concern at stake, the relationship of the legislation to it, and the availability of other means to achieve the end sought that will less drastically invade the liberty.

The interest of the State in protecting those persons who attend defendants' church in the reasonable expectation that they can do so safely has already been examined. The precise question raised by T.C.A. § 39-2208—the right of the State to protect the snake handlers from themselves—is not involved in a public nuisance action. A closely analogous issue is raised, however, with respect to those persons who attend the services with full knowledge both that snakes will be handled and the circumstances under which the activity will take place. This category doubtlessly includes "unanointed" members of the congregation

[6] No criticism of that Court is implied. Judicial opinions must be understood in the context of the state of the law at the time the decision is rendered.

and, as is probable, some visitors. In a real sense they, like the snake handlers themselves, may be said to consent to whatever danger is inherent in their situation. Of course the danger to which they voluntarily expose themselves is the risk involved in observing the snake handling, not the risk of touching the snakes, but because it is quantitatively different does not mean they do not assume whatever jeopardy is involved in the observation. The interest of the State in protecting these individuals may be sufficiently different from that involved with non-consenting adults and minors who are present that it deserves separate consideration.

No general answer can be given to the question of the State's constitutional power to protect the individual from himself. Rather, the State's interest must be weighed against the individual interest in concrete circumstances in which the factors affecting the balance can be identified and evaluated. The greater the impact of one's conduct on other persons or on society as a whole the more pressing is the interest of the State in regulating that conduct. Conversely, as the societal effect of one's conduct diminishes, so does the legitimacy of the State's interest in it.

Conduct that seems to be exclusively *self*-regarding may on closer examination be seen to bear a substantial relationship to the public welfare. Thus, a refusal to be innoculated subjects not only the individual but the public as well to the threat of contagious disease, and the individual may be required to submit a preventive medical treatment. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 49 L.Ed. 643, 25 S.Ct. 358 [1905]. Cf. *Zucht* v. *King*, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 [1922]; *Bissell* v. *Davison*, 65 Conn. 183, 32 A. 348 [1894].

In an instance in which the relationship is not as clear, legislation requiring motorcycle operators to wear crash helmets for their own protection, a New York County Court

has found a nexus in the State's interest in having "robust, healthy citizens." *People* v. *Carmichael,* 56 Misc.2d 388, 288 N.Y.S.2d 931 [Genesee Co. Ct. 1968]. But see, *American Motorcycle Assoc.* v. *Davids,* 11 McA. 351, 158 N.W.2d 72 [1968], in which the Michigan Court of Appeals found that similar legislation violated constitutional guarantees. The court rejected the sufficiency of the State's interest in the "viability of its citizens" as a logic leading to unlimited paternalism.

It is important to recognize that the same relationship between individual conduct and society that would adequately justify a regulation in one case might not in another. The State interest in a robust, healthy citizenry may well provide a rational basis under the level of judicial scrutiny usually required, and will justify, for example, economic and social legislation. The rationale has been utilized in employment contract cases sustaining legislation improving employee's bargaining position. In *Holden* v. *Hardy,* 169 U.S. 366, 42 L.Ed. 780, 18 S.Ct. 383 [1898], the Court recognized that "the whole is no greater than the sum of all the parts," 169 U.S. at 397, and that the individual is consequently an integral part of the entire population. Legislation designed to protect the individual from powerful employers or even "from himself," 169 U.S. at 397, was held to possess a valid relationship to the general welfare. See also *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 81 L.Ed. 1169, 57 S.Ct. 813 [1937]; *New York R. R.* v. *White,* 243 U.S. 188, 61 L.Ed. 667, 37 S.Ct. 247 [1917]; *Chicago B. & O. R. R.* v. *McGuire,* 219 U.S. 549, 55 L.Ed. 328, 31 S.Ct. 259 [1911]. In the instant case, where proper precautions are taken to safeguard on-lookers who do not desire to expose themselves to danger, the conduct of both the snake handlers and nonparticipants who consent to their exposure affects no other individual. Where a "preferred freedom" is at stake and the State can demonstrate no greater interest than the most generalized con-

cern for robust citizens, it has failed to produce a compelling reason for the restriction on them.

In *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 [1973], the Court held that, prior to the third trimester of a woman's pregnancy, the State's interest in protecting the fetus is outweighed by the woman's interest in controlling her own body. This holding was based upon the right to privacy. Since at issue in *Roe* was the State's authority to protect what might be understood in lay, if not legal, terms to be another human life, or at least the potentiality of such other life, we are unable to see how the State's generalized interest in a healthy citizenry can outweigh the right of persons engaged in the earnest exercise of their religion from controlling their own bodies, even if at some danger to themselves, under circumstances where those not sharing their beliefs are fully protected.

In *Reynolds* v. *United States,* 98 U.S. 145, 166, 25 L.Ed. 244, 250 [1879], the Court gave two illustrations of conduct it thought could constitutionally be proscribed—human sacrifice as part of religious worship and a woman taking her life in the fulfillment of religious duty by burning herself on the funeral pyre of her husband. The result we have reached is not inconsistent with the *Reynolds* dicta. Assuming a compelling State interest, no middle ground of a less restrictive alternative exists in those cases—the conduct must be either permitted or prohibited. Furthermore, the State's interest in acting would presumably be stronger than in the case at bar since death in both illustrations is certain, while here it is merely a risk. In the great majority of services in which snakes are used no handler is bitten, and even a bite may not be fatal. Thus, as the Supreme Court observed on another occasion, in undertaking religious activities involving the "harmful *possibilities* . . . of emotional excitement and psychological or physical injury" persons "may be free to become martyrs themselves . . . [b]ut it does not follow they are free, in

identical circumstances, to make martyrs" of others. *Prince* v. *Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645, 654 [1944] [dictum] [emphasis added].

It is the opinion of this Court that the injunction heretofore issued by the trial court is unconstitutionally broad. It should be modified to read "the defendants Liston Pack and Alfred Ball are permanently enjoined from handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to exposure to such danger." This cause is remanded to the trial court for proof, by the defendants, which will satisfy the trial court that non-consenting adults and minors will not be endangered.[7] Alternatives other than those mentioned by the Court, page 10, may be available to the defendants. Until the trial court is so satisfied, the permanent injunction issued by it will remain in force. The hearing on this matter should, upon request by defendants, be expedited.

A decision on whether the defendants should be committed for contempt of court is one left for the sound discretion of the trial court.

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[7] Should the church exclude non-consenting persons from its services, it would not be necessary to physically separate the snake handlers in the manner required when such persons are present. Given the purpose of the religious exercise it seems unlikely the church would adopt this approach. It is to be emphasized, however, that with respect to the State's authority to prevent harm to other persons the burden of proving a knowing and intelligent consent is upon the church. The trial court would necessarily require convincing proof that, for example, persons of insufficient mental capacity to consent will not be present. Children, it must be added, are not legally competent to consent and their parents may not do so for them. See *Jehovah's Witnesses* v. *King Co. Hosp.*, *supra*. As long as children and non-consenting adults are present adequate protective measures must be taken.

The costs of this appeal are taxed one-half to appellants and one-half to appellee.

Modified and Remanded.

/s/ Frank F. Drowota, III
Frank F. Drowota, III, J.

Concur:

/s/ James W. Parrott, P. J. (Dissents)
/s/ Clifford E. Sanders, J.

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

COCKE LAW

STATE OF TENNESSEE, ex rel Henry F. Swann,
District Attorney General

v.

LISTON PACK and ALFRED BALL

Dissenting Opinion

I cannot agree with the result reached by the majority.

Article I of the United States Constitution and Article I, Sec. 3, of the Constitution of Tennessee guarantee to all citizens the right to freedom of worship. However, such constitutional right may not be exercised in a manner so as to cause injury and harm to others. Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299 (1890); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

Under the facts of this case it is clearly established that the appellant's handling of the poisonous snake subjected others to imminent danger or bodily harm. It has been held that the handling of snakes in a religious service is a violation of our statutory law. T.C.A. 38-2208; Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1949). It is my opinion the handling of the snake on this occasion did endanger the safety and health of the others, thereby creating a nuisance. Thus, there being a nuisance, the court not only has the authority but the duty to restrain.

I would affirm the judgment as entered.

/s/ JAMES W. PARROTT
James W. Parrott,
Judge

OPINION OF THE SUPREME COURT OF TENNESSEE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

COCKE LAW

HONORABLE GEORGE R. SHEPHERD, *Circuit Judge*

FOR PUBLICATION September 8, 1975

STATE OF TENNESSEE, EX REL. HENRY F. SWANN,
DISTRICT ATTORNEY GENERAL, *Petitioner,*

v.

LISTON PACK, PASTOR OF THE HOLINESS CHURCH OF GOD IN
JESUS NAME, ET AL, *Respondents.*

For Petitioner:

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Attorney General

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HENRY F. SWANN
District Attorney General

For Respondents:

EDWARD MICHAEL ELLIS
Knoxville, Tennessee

THEO. J. EMISON, JR.
Alamo, Tennessee

Opinion

Reversed and Remanded.

HENRY, J.

We granted certiorari in this case to determine whether the State of Tennessee may enjoin a religious group from handling snakes as a part of its religious service and in accordance with its Articles of Faith, on the basis of such action constituting a public nuisance.

The Circuit Court at Newport permanently enjoined the defendant, Pack, Pastor of The Holiness Church of God in Jesus Name, of Newport, and one of his Elders from "handling, displaying or exhibiting dangerous and poisonous snakes", predicating its action primarily upon a finding that "the handling of said dangerous and poisonous snakes is in violation of T.C.A. 39-2208 [1] and that said practice is done in the presence of children and other people attending church services. . . .".

The Court of Appeals, in a split decision, found the injunction to be overbroad and modified it to read that the respondents

> are permanently enjoined from handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to exposure to such danger.

Petitioner assigns a single error, viz:

> The Court of Appeals erred in holding that the State could not completely enjoin violations of T.C.A. § 39-2208 as common law public nuisances.

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[1] Section 39-2208 reads as follows:

Handling snakes so as to endanger life—Penalty—It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.

Any person violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred and fifty dollars ($150), or by confinement in jail not exceeding six (6) months, or by both such fine and imprisonment, in the discretion of the court.

As a triggering device to invoke the jurisdiction of this Court, this assignment is sufficient; however, it does not raise the precise issue before the Court for determination. This follows from the basic principle that a common law nuisance is not founded on any statute and a public nuisance may exist with or without statutory predicate. While other questions lurk in the record, we deem the critical and controlling issue to be as set forth in the opening sentence of this opinion.

I.

To place this controversy in proper perspective, we note the pleadings and trial proceedings.

On April 14, 1973, the District Attorney General of the Second Judicial Circuit filed his petition in the Circuit Court at Newport charging that respondents Pack and certain designated Elders, including Albert Ball, had been handling snakes as a part of their church service "for the last two years"; that this was one of the rituals of the church to test the faith and sincerity of belief of church members; that Pastor Pack "has become annointed", along with other members of the church and has "advanced" to using deadly drugs, to wit, strychnine; that at a church service on April 7, 1973 snakes were handled and an "Indian boy was bitten and his arm became swollen"; that two named church members drank strychnine and died as a result; that, at the funeral of one of these, Pastor Pack, and others, handled snakes; and that Pastor Pack proclaimed his intentions to continue these practices. The prayer was for an injunction enjoining respondents "from handling, displaying, or exhibiting poisonous snakes or taking or using strychnine or other poisonous medicines." In the alternative, and upon failure of the named defendants to cease and desist, petitioner prayed that the church be padlocked as a public nuisance.

By order entered April 21, 1973, the trial court found these facts to be true; that § 39-2208 had been violated and ordered that the defendants be

> (e)njoined from handling poisonous snakes or using deadly poisons in any church service being conducted in said church or at *any other place in Cocke County, Tennessee* until further orders of the Court. (Emphasis supplied).

Why the judge of a court having personal jurisdiction of the parties and state-wide jurisdiction of the subject matter elected to permit these defendants to practice snake handling as a part of their religious worship in ninety-four counties of the state and deny them the same identical right in the remaining county is not clear.

Moreover the record reflects that immediately following the above quoted language the trial judge added, in his own handwritting, the following:

> However, any person who wishes to swallow strychnine or other poison may do so if he does not make it available to any other persons.

The further result of this order was that defendants could not practice snake handling, from which death *might* ensue [2] but could drink strychnine, a highly poisonous drug.[3]

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[2] The most common question that arises regarding ritual snake-handling is the surprisingly small number of fatalities. L.M. Klauner, "the undoubted authority on the rattlesnake" writes that the fatalities from this cause (rattlesnake bite) for the entire United States, with a population of over 160 million, seldom exceed 30 per year. Of every 100 people bitten by rattlesnakes, only about 3 will die. W. LaBarre, They Shall Take Up Serpents, pp. 13-14 (University of Minnesota Press 1962), (hereinafter referred to as LaBarre).

[3] See Dorland's Medical Dictionary; Stedman's Medical Dictionary.

The record reflects no explanation for this incongruity.

Thereafter, the District Attorney General filed a second petition alleging stepped up activity, at the Holiness Church. On July 1, 1973, "a national convention for the snake handlers' cult of the United States" was held and "many dangerous and poisonous snakes were displayed" and one of the handlers had been bitten and was in a Chattanooga hospital recuperating.[4] Services were conducted on July 3 and July 7, 1973, and again snakes were handled. All this led the District Attorney General to conclude and charge that Cocke County was in imminent danger and likely to "become the snake handling capital of the world".

In response to this citation, respondents were held in contempt, fined and sentenced, but sentences were suspended in each case, "until the said defendant handles poisonous snakes at said church are (sic) any other place *in Cocke County, Tennessee.*"

Up to this point defendants had not been represented by counsel.

By order entered August 18, 1973 respondents were jailed in default of payment of the fines theretofore imposed and directed to appear on August 25, 1973 to show cause why they should not be required to serve the sentences.

The hearing was conducted on August 25, 1973 and September 27, 1973. There is no substantial factual dispute between the parties. In fact the entire factual situation is dependent upon the pleadings, the testimony of one witness, various stipulations and exhibits.

It was stipulated that various witnesses would testify that they had never seen anyone other than designated representatives of this particular church handle snakes; that

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[4] For a graphic presentation of this meeting, designated as a "homecoming", see Pelton and Carden, Snake Handlers (1974), (hereinafter referred to as Pelton and Carden).

they never saw any person who was either a parishioner or a nonmember present at the church service who had ever been placed in immediate danger.

It was further stipulated that an anthropologist would testify that snake handling is a legitimate part of their religious service; that she had never seen anyone endangered by handling snakes; that proper precautions were always taken; and that handling snakes is a legitimate and historic part of the church service. Two other witnesses would verify this testimony.

It was further stipulated that the "Indian boy", bitten at one of the services, was thirty years old.

It was further stipulated that the Holiness Church of God in Jesus Name is located about a half mile from the nearest paved road, and at the end of a dead-end, dirt, private, mountain road and on property owned by the church.

The issues were not fully developed and the record is meager.

The State made no contention that this is not an organized religious group nor did it question that the practice of handling snakes was a recognized part of its Articles of Faith, nor did it question the sincerity of the conviction of the respondents.

By final decree the trial judge made the injunction permanent, directing that defendants "be perpetually enjoined from handling, displaying or exhibiting dangerous and poisonous snakes at the said Holiness Church of God in Jesus Name, *or at any other place in Cocke County, Tennessee.*"

II.

The history and development of the Holiness Church is relevant.

The Mother Church[5] was founded in 1909 at Sale Creek in Grasshopper Valley, Tennessee, approximately thirty-five miles northeast of Chattanooga, by George Went Hensley. Hensley was motivated by a dramatic experience which occurred atop White Oak Mountain on the eastern rim of the valley during which he confronted and seized a rattlesnake which he took back to the valley and admonished the people to "take up or be doomed to eternal hell."[6]

Hensley, and his followers, based their beliefs and practices on Mark 16, verses 17 and 18, which in the Authorized or King James version read as follows:

> And these signs shall follow them that believe; in my name shall they cast out devils; and shall *speak with new tongues;*
>
> *They shall take up serpents;* and if they *drink any deadly thing,* it shall not hurt them, they shall lay hands on the sick, and they shall recover. (Italics ours)[7]

The Church Hensley[8] founded spread throughout the south and southeast and continues to exist today, primarily

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[5] The Dolly Pond Church of God With Signs Following. Collins, Tennessee Snake Handlers, page 1 (1947), (hereinafter referred to as Collins).

[6] Ibid, p. 2.

[7] Both the Old and New Testaments, however, contain language which would appear to be injunctions against snake handling and speaking in tongues. In Ecclesiastes (King James version) 10:11, it is said: "Surely the serpent will bite without enchantment, and the babbler is no better." St. Paul warns the Corinthians, in his First Epistle (Ch. 10 Verse 9) "Neither let us tempt Christ, as some of them also tempted, and were destroyed of serpents."

[8] Hensley remained active in the ministry of the church for some forty-six years. He said he had been bitten four hundred times "till I'm speckled all over like a guinea hen." (LaBarre, page 45) This founder and prophet of the church died, refusing medical attention, as a result of being bitten by a diamondback rattlesnake during a prayer meeting at Lester's Shed near Altha, Florida, on Sunday night, July 24, 1955 (Ibid. page 48).

in rural and relatively isolated regions throughout this area. The Holiness Church of God in Jesus Name, in Cocke County, is a part of this movement. LaBarre, in *They Shall Take Up Serpents,* asserts that "(t)he roots of the movement lie deep in American religious history" and asserts that it is one of the "offshoots of Methodism." Writers seem to be in general agreement that it is a "charismatic sect, or cult, or group of the Pentecostal variety."[9]

To say that this is not a conventional movement would be a masterpiece of understatement. Its beliefs and practices are, to say the least, unconventional and out of harmony with contemporary customs, mores and notions of morality. They oppose drinking (to include carbonated beverages, tea and coffee), smoking, dancing, the use of cosmetics, jewelry or other adornment. They regard the use of medicine as a sure sign of lack of faith in God's ability to cure the sick and look upon medical doctors as being for the use of those who do not trust God. When greeting each other, the men use the 'holy kiss", a mouth-to-mouth osculation "accompanied by a vigorous, if not passionate hug." The "holy kiss" is not exchanged between members of the opposite sexes.[10]

But it is their belief in handling serpents that has catapulted them into the limelight and has produced their legal difficulties.

There is some apparent confusion with respect to their purpose in the use of serpents as a central practice in their religious beliefs. *Harden, et al.* v. *State,* 188 Tenn. 17, 216 S.W.2d 708 (1948) treated snake handling as being "the test and proof of the sincerity of their belief." In this rec-

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[9] Ibid., page 29; E. Clark, The Small Sects in America, pages 23, 85 (Rev. ed. 1949)

[10] This is a composite based upon: Collins, pages 4 & 5; LaBarre, pages 16 & 17; Callahan, Smoky Mountain Country, pages 91-95 (1952).

ord it is asserted that the use of serpents is designed as a test of the faith and sincerity of church members. Our research indicates that this is not precisely correct. Their basic reason is compliance with the scripture as they interpret it, and as required by their Articles of Faith. But the practice of snake handling is not a test of faith, nor proof of godliness. Its sole purpose is to "confirm the word". In the words of Alfred Ball, a defendant to this suit:

> We don't take up serpents, handle fire or drink strychnine to test the faith of the people at all. That's not the point of it, . . . These are signs that God said would follow the believers. And, these signs, are to confirm the Word of God, and that's the only purpose for them . . . They're not to test the faith of the person doing it. They're not test whether he's a good person. It's simply and only to confirm the Word of God. That's all God intended the signs for, and that's the only reason we do them.[11]

Pastor Pack states:

> What serpent handling's for anyway is to confirm the Word.[12]

Whether the practice is to "test the faith", is not relevant to this controversy. We only make the distinction in the interest of an accurate and comprehensive statement of the beliefs of this religious group and its admittedly unusual ritual.

We should point out that the snakes are supplied by "sinners" or "sinner men" or unbelieving "sinner boys" or "unbelievers." [13]

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[11] Pelton & Carden, page 22, 1974. See also pages 24 and 25.

[12] Ibid.

[13] LaBarre, page 23; The American Imagination at Work, Clough, page 156 (1947), containing an article by K. Kerman, Rattlesnake Religion, selected and edited by Lealon N. Jones.

Lastly, it should be pointed out that snakes are only handled when the member or handler has become "anointed". As we understand this phenomenon and the emotional reaction it produces, it is something akin to saying that a member doesn't handle snakes until the "spirit moves him". Unquestionably this is an emotional stimulus produced by extreme faith and generating great courage. Perhaps the whole belief in "anointment" can best be summed up by the defendant, Liston Pack:

> When I become anointed to handle serpents, my hands get real numb. It is a tremendous feeling. Maybe symbolic to an electric shock, only an electric shock could hurt you. This'll be pure joy.
>
> * * *
>
> It comes from inside . . . If you've got the Holy Ghost in you, it'll come out and nothing can hurt you. Faith brings contact with God and then you're anointed. It is not tempting God. You can't tempt God by doing what He says do. You can have faith, but if you never feel the anointing, you had better leave the serpent alone.[14]

Such is the nature of the religious group with which we deal.

III.

Again, this is not a conventional religious group and its members are few. There is, however, no requirement under our State or Federal Constitution that any religious group be conventional or that it be numerically strong in order that its activities be protected. Nor is there any requirement that its practices be in accord with prevailing views.

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[14] Pelton & Carden, page 32.

The First Amendment to the Constitution of the United States requires in clear terms that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Article 1, Section 3 of the Constitution of Tennessee contains a substantially stronger guaranty of religious freedoms. It provides:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, i any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

A "mode of worship", even of a religious group wherein the handling of serpents is central to its Articles of Faith, is constitutionally protected under the Constitutions of Tennessee and of the United States.

In his original draft of the Virginia Act Establishing Religious Liberties, Thomas Jefferson, postulated, *inter alia:*

> No man is a competent judge of the religion of another.

Under our constitutions, a citizen may be a devout Christian, a dedicated Jew or a consummate infidel—or he may be a member of the Holiness Church of God in Jesus Name. The government must view all citizens and all religious beliefs with absolute and uncompromising neutrality. The day this Country ceases to countenance irreligion or unusual or bizarre religions, it will cease to be

free for all religions. We must prefer none and disparage none.

We, therefore, hold that the Holiness Church of God in Jesus Name, is a constitutionally protected religious group.

This is not to say; however, that this or any other religious group has an absolute and unbridled right to pursue any practice of its own choosing. The right to believe is absolute; the right to act is subject to reasonable regulation designed to protect a compelling state interest. This belief-action dichotomy has been the subject of numerous decisions of the Supreme Court of the United States.

IV.

An early case dealing with the belief-action dichotomy is *Reynolds* v. *United States,* 98 U.S. 145, 25 L.Ed. 244 (1878), wherein the defendant, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, was indicted for polygamy and defended upon the ground that, under his religious faith, it was his duty to practice polygamy. In disposing of this contention and in holding that a religious belief cannot be a justification for a criminal violation, the Court said:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is pro-

> vided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. 98 U.S. 166, 167.

This philosophy was further refined and advanced in *Davis* v. *Beason,* 133 U.S. 333, 10 S.C. 299, 33 L.Ed. 637 (1890), wherein the Court said:

> The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. 133 U.S. 342.
>
> It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free

> exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as "religion." 133 U.S. at 345.

In *Cantwell* v. *State of Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court succinctly stated the belief-action doctrine and simultaneously recognized the delicate balance which must be preserved, in these words:

> Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. 310 U.S. 303, 304.

This was the first case to apply the "clear and present danger doctrine" in the context of First Amendment freedoms of religion, vis-a-vis a "substantial interest of the state." In this respect the Court said:

> When *clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. (Emphasis supplied) 310 U.S. 308.

The words of the late Chief Justice Hughes, writing for the Court in *Cox* v. *State of New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) are pertinent:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society, maintaining

> public order without which liberty itself would be lost in the excesses of unrestrained abuses. 312 U.S. 574.

In *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the Supreme Court had under consideration a resolution of a state board of education requiring that children, in public schools, salute the American Flag. Members of Jehovah's Witnesses objected on the grounds that under their religious teachings the flag is an "image" within the prohibition of the commandment against graven images. In holding that the state could not validly enforce such a requirement the Court observed that First Amendment freedoms "are susceptible of restriction only to prevent *grave and immediate* danger to interests which the state may lawfully protect". The Court said, *inter alia:*

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion. . . . 319 U.S. 642.

In *Thomas* v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), the Court said of the First Amendment freedoms:

> (A)ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by *clear and present danger.* The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest upon a firm foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time or place, must have clear support in public danger, actual or impending. Only the *gravest abuses, endangering paramount interests,* give occa-

> sion for permissible limitation. (Italics ours). 323 U.S. 530.

In *Harden, et al* v. *State, supra,* this Court was confronted with a challenge to the constitutionality of Chapter 89, Public Acts of 1947 (now § 39-2208, T.C.A.), on the basis of its alleged violation of the Freedom of Religion Clauses of the State and Federal Constitutions. After citing the belief-action dichotomy of *Cantwell, supra,* certain of the dicta in *Reynolds, supra,* and the "grave and immediate danger" doctrine of *Barnette, supra,* the Court said:

> It is equally certain that this danger is grave and immediate when and wherever the practice is being indulged. 216 S.W.2d at 711.
>
> • • •
>
> They may believe without fear of any punishment that it is right to handle poisonous snakes while conducting religious services. But the right to practice that belief "is limited by other recognized powers, equally precious to mankind." (citation omitted). One of those equally as precious rights is that of society's protection from a practice, religious or otherwise, which is dangerous to life and health. *Id.*

There cannot be any question that the Court acted upon acceptable legal principles and precedents in declaring the Tennessee Snake Handler's Act constitutional in the face of an attack based upon the Freedom of Religion Clauses of the state and federal constitutions. This is not, however, to say that its application would necessarily be constitutional under all circumstances as is hereinafter pointed out. *Harden* simply holds that the statute does not violate the freedom of religion guarantees of the federal or state constitutions and that the defendants, under the factual situation of that particular case, had handled snakes "in such a manner as to endanger the life or health of any

person". Neighboring states having similar statutes have uniformly upheld and applied them. [15]

Another relevant Tennessee case is *Gaskin* v. *State*, 490 S.W.2d 521 (Tenn. 1973), wherein this Court held that the Tennessee statute (§ 52-1409, et seq., T.C.A.) relating to the manufacture of marijuana, as applied to the defendants, was not unconstitutional as an infringement of the right to the free exercise of religious faith. The Court relied upon *Reynolds, supra,* and *Harden, supra,* and recognized that the marijuana statutes were adopted to preserve public morals and safety.

A most significant post-*Harden* case is *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) in which the Court's ruling has been characterized as "a new test whereby the burden imposed on an individual because of a restriction on the free exercise of his religion is balanced against the state's interest in controlling the individual's practice of his religion." [16] The Court in *Sherbert* made it clear that the state's interest must be more than rational or colorable in this highly sensitive constitutional area, and that "only the gravest abuses, endangering, paramount interests, give occasion for permissible limitation." 374 U.S. at 406. The Court outlined a two-stage approach, viz: (1) whether the statute imposes a burden upon the free exercise of religion and (2) whether some compelling state interest justifies the infringement.

The most significant and relevant decision since this Court decided *Harden*, is *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Members of the Amish

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[15] See *Kirk* v. *Commonwealth*, 186 Va. 839, 44 S.E.2d 409 (1947), *Lawson* v. *Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942); *Hill* v. *State*, 88 So.2d 880 (Ala.App.1956); *State* v. *Massey*, 229 N.C. 734, 51 S.W.2d 179 (1949).

[16] 24 Vand.L.Rev. 810 (1971).

faith were convicted of violating Wisconsin's compulsory school attendance law by refusing to send their children to school after they had graduated from the eighth grade. Attendance at high school is contrary to the Amish faith. The Court affirmed the Wisconsin Supreme Court, holding that their criminal convictions were invalid under the Free Exercise Clause of the First Amendment to the Constitution of the United States. It was stipulated that the defendants' religious beliefs were sincere.

Apropos the case at bar is the following language from the opinion of the Court:

> Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. 406 U.S. at 215, 216.
>
> * * *
>
> Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. (Citations omitted). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free

> Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. (Citations omitted). This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. 406 U.S. at 219, 220.

The holding of *Yoder* is essentially that permitting the Amish to educate their children, after they have completed the eighth grade, in their own way and in deference to their established religious views, the statutory requirement to the contrary notwithstanding, would not impair the health of the children, nor result in their inability to be self-supporting or to discharge the duties and responsibilities of citizenship, nor in any way materially detract from the welfare of society. Therefore, the Court held that the state's interest was not so compelling as to overrule the freedom of the Amish to pursue their established religious practice.

Respondent urges upon us that the "belief-action" dichotomy was expressly rejected by the Court in *Yoder* and apparently bases this insistence upon the above quoted language. What the Court actually rejected was the "idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause." The consistent holding of the courts has been that belief is *always* protected, but that conduct or action is subject to regulation in the manner and to the extent hereinabove set forth.

The opinion of the Court of Appeals, with respect to *Harden*, reasons that subsequent decisions of the Supreme Court of the United States "have removed the theoretical underpinnings on which the decision was based." The opinion recites:

> The *Harden* decision was premised on the subsequently rejected belief-action dichotomy in free exercise cases,

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requiring merely a rational relationship between restrictions on religious conduct and the state interest served by the restrictions.

We respectfully differ with our brothers of the Court of Appeals. Without laboring the point, *Harden* was premised on belief-action, but to an equal if not greater extent upon the "clear and present" danger and "substantial interest" doctrine of *Cantwell, supra.*

We read nothing in *Yoder* that would fault the analytic approach of the *Harden* Court or cause us to reject its reasoning or results.

We hold that under the First Amendment to the Constitution of the United States and under the substantially stronger provisions of Article 1, Section 3 of the Constitution of Tennessee, a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be resonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of a balancing of the interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate.

The right to the free exercise of religion is not absolute and unconditional. Nor is its sweep susceptible of discrete and concrete compartmentilization. It is perforce, of necessity, a vague and nebulous notion, defying the certainties of definition and the niceties of description. At some point the freedom of the individual must wane and the power, duty and interest of the state becomes compelling and dominant.

Certain guidelines do, however, emerge under both constitutions.

Free exercise of religion does not include the right to violate statutory law.

It does not include the right to commit or maintain a nuisance.

The fact that one acts from the promptings of religious beliefs does not immunize against lawless conduct.

But, again, the scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must be clear and present and so grave as to endanger paramount public interests.

We decide this controversy in the light of these objectives. In doing so we have not lost sight of the fact that snake handling is central to respondents' faith. We recognize that to forbid snake handling is to remove the theological heart of the Holiness Church and this has prompted this Court to investigate and research this matter with meticulous care and to announce its decision through an unusually extensive opinion.

We agree with the Court of Appeals that Tennessee's snake handling statute (§ 39-2208 T.C.A.) is not controlling. However, it cannot be ignored. It proscribes, to some extent, the conduct with which we deal. The trial judge based his judgment, in part, upon its violation and, in a very real sense, it represents a part of the public policy of our state, as declared by the legislature. [17]

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[17] The public policy of the state is to be found in its constitution, statutes, judicial decisions and applicable rules of the common law. *Home Beneficial Assn.* v. *White*, 180 Tenn. 585, 177 S.W.2d 545 (1944).

This statute is not as comprehensive or as conclusive as is generally believed. Nor is it a model of clarity. In material particulars it makes it unlawful

> (t)o display, exhibit, handle or use any poisonous or dangerous snake or reptile *in such manner as to endanger the life or health of any person.*

At a glance, it is self-evident that it does not forbid snake handling *per se.*

It condemns the *manner* and not the *fact* of snake handling.

Conversely it permits snake handling if done in a careful and prudent manner or, in the statutory terminology, under any circumstances or in any manner which does not endanger the life or health of any person.

Obviously, it was not intended to prevent zoologists or herpetologists from handling snakes or reptiles as a part of their professional pursuits, nor to preclude handling by those who do so as a hobby, nor those who are engaged in scientific or medical pursuits requiring the handling of snakes.

It is equally obvious that the phrase "any person" must mean any *other* person. If the Legislature had not so intended it would have placed a period at the end of the word reptile, leaving language which made it unlawful "to display, exhibit, handle or use any poisonous snake or reptile." Not having done this one must logically assume that the Legislature was concerned with the *manner* and not the *fact* of snake handling, leaving the zoologist, the herpetologist or anyone else to their own devices subject only to the admonition that their handling must not be done "in such manner as to endanger the life or health of any (other) person." But this is from a standpoint of criminal violations.

Convictions under this statute involve proof of two elements, viz (1) that poisonous or dangerous snakes or reptiles were handled and (2) in such manner as to endanger the life or health of any other person. These elements were obviously present in *Harden.*

The trial judge was in error in applying the restricted standard of the statute. This is not a criminal prosecution. Its consequences are more far-reaching and it is to be decided on a substantially different basis.

VI.

This is a suit to abate a nuisance.

The right of the District Attorney General to institute and maintain such an action inheres in his office. It is his duty to investigate, prosecute and insure against all infractions of the public peace and all acts which are against the peace and dignity of the state.

We hold that the handling of snakes as a part of a religious ritual is a common law nuisance, wholly independent of any state statute.

In 58 Am.Jur.2d, Nuisances, § 7, a public nuisance is defined as follows:

> It is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law.

In *Yarbrough* v. *Louisville and Nashville Ry. Co.*, 11 Tenn. App. 456 (1930) a common law nuisance is defined as follows:

> (a) nuisance in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable or comportable use of property.

Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of "anointment", we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their "Homecoming" of April 7, 1970 is proof positive.

Our research confirms the general pattern.

Tennessee has the right to guard against the unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust, tax-paying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower. We, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interests.

It has been held that a state may compel polio shots, *McCartney* v. *Austin*, 57 Misc.2d 525, 293 NYS2d 188 (Sup. Ct. 1968); may regulate child labor, *Prince* v. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); may require compulsory chest x-rays, *State ex rel. Holcomb* v. *Armstrong*, 239 P.2d 545 (Wash. 1955); may decree compulsory water fluoridation, *Kraus* v. *City of Cleveland*, 127 N.E.2d 609 (Ohio 1955); may mandate vaccinations as a condition of school attendance, *Wright* v. *Dewitt School District*, 385 S.W.2d 644 (Ark. 1965); and may compel medical care to a dying patient, *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964).

This holding is in no sense dependent upon the way or manner in which snakes are handled since it is not based

upon the snake handling statute. Irrespective of its import, we hold that those who publicly handle snakes in the presence of other persons and those who are present aiding and abetting are guilty of creating and maintaining a public nuisance. Yes, the state has a right to protect a person from himself and to demand that he protect his own life.

Suicide is not specifically denounced as a crime under our statutes but was a crime at the common law.[18] Tennessee adopted the Common Law as it existed at the time of the separation of the colonies. *Dunn* v. *Palermo,* 522 S.W. 2d 679 (Tenn. 1975). An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave public wrong, and we hold that the state has a compelling interest in protecting the life and promoting the health of its citizens.

Most assuredly the handling of poisonous snakes by untrained persons and the drinking of strychnine are not calculated to increase one's life span.

VIII.

The trial judge enjoined the respondents from handling poisonous snakes or using deadly poisons in any church service in Cocke County but authorized the consumption of strychnine.

He erred.

The Court of Appeals modified the injunction so as to enjoin respondents from handling, displaying or exhibiting dangerous and poisonous snakes in such manner as will endanger the life or health of persons who do not consent to exposure to such danger.

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[18] See 40 Am.Jur.2d Homicide, Sec. 583.

There is no reason to restrict the injunction to the terms of the statute, nor is there any occasion for applying a "consenting adult" criterion.

On remand the trial judge will enter an injunction perpetually enjoining and restraining all parties respondent from handling, displaying or exhibiting dangerous and poisonous snakes or from consuming strychnine or any other poisonous substances, within the confines of the State of Tennessee.

At this time it is the view of this Court that no useful purpose would be served by punishing respondents for contempt of court.

We fully appreciate the fact that the decision we reach imposes stringent limitations upon the pursuit of a religious practice, a result we endeavored to avoid. After long and careful analysis of alternatives and lengthy deliberations on all aspects of this problem we reached the conclusion that paramount considerations of public policy precluded less stringent solutions. We gave consideration to limiting the prohibition to handling snakes in the presence of children, but rejected this approach because it conflicts with the parental right and duty to direct the religous training of his children. We considered the adoption of a "consenting adult" standard but, again, this practice is too fraught with danger to permit its pursuit in the frenzied atmosphere of an emotional church service, regardless of age or consent. We considered restricting attendance to members only, but this would destroy the evangelical mission of the church. We considered permitting only the handlers themselves to be present, but this frustrates the purpose of confirming the faith to nonbelievers and separates the pastor and leaders from the congregation. We could find no rational basis for limiting or restricting the practice, and could conceive of no alternative plan or procedure which would be palatable to the

membership or permissible from a standpoint of compelling state interest. The very considerations which impel us to outright prohibition, would preclude fragmentation of the religious services or the pursuit of this practice on a limited basis.

This cause is remanded to the Circuit Court at Newport and will be retained on the active docket for the enforcement of the injunction and such other, further and additional actions and orders as may become necessary.

Reversed.

The costs are assessed against the petitioners.

/s/ HENRY

Henry, J.

Concurring:
FOXES, C.J.
COOPER, J.
BROCK, J.
HARBISON, J.

Tennessee Code Annotated § 39-2208. It shall be unlawful for any person or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.

Any person violating the provisions of this section shall be guilty of a misdeameanor punishable by a fine of not less than $50.00 nor more than $150.00, or by confinement in jail not exceeding six months, or by both such fine and imprisonment, in the discretion of the Court. Volume 7 of Tennessee Code Annotated at Page 257.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-956

LISTON PACK, Pastor of the Holiness Church of God in Jesus Name, et al.,
Petitioners,

vs.

STATE OF TENNESSEE, ex rel. Henry F. Swann, District Attorney General,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, State of Tennessee, respectfully submits that the Petition for a Writ of Certiorari filed in this case should be denied.

OPINIONS BELOW

The opinion of the Circuit Court of Cocke County, Tennessee, handed down on September 27, 1973, is unreported but appears in the Appendix of the Petition for a Writ of Certiorari filed herein. (Appendix, pp. 1a-2a). The opinion of the East-

ern Section of the Court of Appeals of Tennessee dated October 25, 1974 is also unreported but appears in the Appendix of the Petition for a Writ of Certiorari filed herein. (Appendix, pp. 3a-22a). The opinion of the Tennessee Supreme Court is reported at 527 S.W.2d 99.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution and Tennessee Code Annotated, Section 39-2208 which provides:

> "It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.
>
> Any person violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred and fifty dollars ($150.00), or by confinement in jail not exceeding six (6) months, or by both such fine and imprisonment, in the discretion of the court."

QUESTION PRESENTED

Whether the judicial determination that the petitioners' religiously motivated, public handling of poisonous snakes and drinking of poison amounted to a common law nuisance violates the Free Exercise Clause of the First Amendment or the petitioners' constitutionally protected right of privacy.

STATEMENT OF THE CASE

On April 14, 1973, the District Attorney General for Cocke County, Tennessee, filed an action in the Cocke County Circuit Court seeking to enjoin the petitioners from handling poisonous snakes and drinking poisonous liquids during their much publicized religious services. The circuit court granted the State a temporary injunction on April 21, 1973. Three months later, on July 28, 1973, the circuit court held the petitioners in contempt of court for willfully violating the terms of this order.

The petitioners eventually filed their answer to the State's petition for an injunction on September 27, 1973, the day of the hearing to determine whether the temporary injunction should be made permanent. The petitioners admitted in their answer that they and others attending their services handled poisonous snakes and that persons have been bitten during these episodes.

There is no substantial factual dispute between the parties. The entire factual situation is dependent upon the pleadings, the testimony of one state witness at the hearing held September 27, 1973, and several stipulations and exhibits.

The petitioners and members of their congregation as well as others desiring to be present out of curiosity conduct their religious services at the Holiness Church of God in Jesus Name in Cocke County, Tennessee. The church is a small structure holding no more than one hundred people which is located at the end of an unpaved mountain road approximately one-half mile from the nearest paved road. Because of the increasing notoriety of this church's activities, an agent of the Tennessee Bureau of Investigation attended three different church services. He testified with particularity about one service when the church

was filled with curiosity seekers, young children and the regular parishioners. Four persons handled poisonous snakes during that service.

The part of the church where the snakes were handled consisted of a small area not more than ten feet wide between the rostrum and the first row of benches where the congregation sat. Children customarily sat in these front row benches with their parents, and the agent observed children sitting on the front benches during the services he attended. After discovering that no one would be arrested for handling snakes, petitioner Liston Pack announced to the audience that there was a snake available for handling if anyone felt that they were "annointed" or if the "spirit" told them to.

While the congregation clapped and sang, Pack took a brown, wooden box from beneath the rostrum, and after placing it on the front bench where people were sitting, removed a diamond back rattle snake from the box, handled it briefly, and then returned the snake to the box, which he then placed atop the rostrum. Later in the service, the snake was handled by petitioner Ball who handed it to a member of the choir and later to an older member of the audience. The entire service lasted approximately ninety minutes, and the snake was not handled longer than four minutes. However, while the snake was being handled, children were sitting within ten feet of these activities and were walking unattended in the aisle. On one occasion during the service, petitioner Ball almost dropped the snake but was able to catch it before it hit the floor.

The parties also stipulated that they had repeatedly handled poisonous snakes and that they had willfully violated Tennessee Code Annotated, Section 39-2208. They also stipulated that one or more persons had been bitten by poisonous snakes during their services. The petitioners also tendered the testimony of an anthropologist who would state that snake handling

has been a traditional part of this church's rituals as well as the testimony of two individuals who were of the opinion that the handling of poisonous snakes did not pose a danger to the "non-annointed" members of the audience. This evidence differed from the Tennessee Bureau of Investigation agent's testimony that he felt he might be in some danger when the snake was removed from the box even though he was seated midway back in the congregation.

Based on this proof, the circuit court dismissed the petitioners' claims that "(t)o enjoin the defendants would violate their constitutional rights of privacy and religion" and permanently enjoined the petitioners from handling poisonous snakes but permitted them to drink poisonous liquids as long as they did not offer them to any other persons (Petitioners' Appendix, pp. 1a-2a). The petitioners perfected an appeal to Eastern Section of the Court of Appeals of Tennessee again alleging the permanent injunction handed down by the circuit court violated First Amendment rights as well as their right to privacy.

The Court of Appeals, with one judge dissenting ruled in its opinion handed down on October 25, 1974, that the injunction handed down by the circuit court was unconstitutionally overbroad. (Petitioners' Appendix, p. 20a). While the court found that the State had proved that the petitioners' activities constituted a public nuisance (Petitioners' Appendix, p. 14a), the court concluded that the petitioners' right of privacy coupled with their constitutionally protected freedom of religion, permitted them to handle poisonous snakes or imbibe poisonous liquids as long as these activities did not endanger the life or health of any persons who did not consent to exposure to this danger. (Petitioners' Appendix, pp. 18a-20a).

The Tennessee Supreme Court granted the State's petition for a writ of certiorari to review the opinion of the Court of Appeals, and on September 8, 1975, reversed the decision of the inter-

mediate appellate court and reinstated and broadened the earlier decree of the Cocke County Circuit Court. The Court held:

> "We hold that under the First Amendment to the Constitution of the United States and under the substantially stronger provisions of Article 1, Section 3 of the Constitution of Tennessee, a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be reasonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of a balancing of interests between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed in favor of religious freedom, and yet the balance is delicate."
>
> *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (Petitioners' Appendix, p. 42a).

The Court then analyzed the facts contained in the record of this case and concluded:

> "Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of 'annointment', we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their 'Homecoming' on April 7, 1970 is proof positive."
>
> *State ex rel. Swann v. Pack, supra*, 527 S.W.2d at 113 (Petitioners' Appendix, p. 46a).

Having determined that the petitioners' activities constituted a public nuisance, the Tennessee Supreme Court turned to the question of the appropriate remedy. After directing the circuit court, on remand, to enter an injunction permanently enjoining the petitioners from handling, displaying or exhibiting dangerous and poisonous snakes or from consuming poisonous substances within the State of Tennessee, the Court noted:

> "We could find no rational basis for limiting or restricting the practice, and could conceive of no alternative plan or procedure which would be palatable to the membership or permissible from a standpoint of compelling State interest. The very considerations which impel us to outright prohibition, would preclude fragmentation of the religious services or the pursuit of this practice on a limited basis."
> *State ex rel. Swann v. Pack, supra,* 527 S.W.2d at 114
>
> (Petitioners' Appendix, pp. 48a-49a).

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REASONS FOR DENYING THE WRIT

I

The Tennessee Supreme Court's Decision Adhered Strictly to Federal Precedents Involving First Amendment Liberties.

The Tennessee Supreme Court's decision is premised on the distinction, consistently recognized by this Court, between an individual's unencumbered right to believe whatever he chooses and his right to translate his beliefs into action. While the former is not subject to regulation or governmental interference of any sort, the latter is often subject to regulation by the state when the health, safety or welfare of society is involved. *Wisconsin v. Yoder*, 406 U.S. 205, 219-220, 92 S.Ct. 1526, 1535 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903 (1940); and *Reynolds v. United States*, 98 U.S. 145, 166-167, 25 L.Ed. 244, 250-251 (1878). The Tennessee Supreme Court recognized, however, as has this Court, that even if the State demonstrates a compelling state interest which justifies interference with an individual's First Amendment rights, it must protect these societal interests by using a method that will cause as little interference with the individual's rights as possible. *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003 (1972) and *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (1961).

Using the balancing approach formulated by this Court in *Sherbert v. Verner*, 374 U.S. 398, 406-407, 83 S.Ct. 1790, 1795-1796 (1963), the Tennessee Supreme Court found that Tennessee's compelling interest in protecting the health, safety and welfare of its citizens justified the burden placed upon the petitioners' exercise of certain of their religious beliefs.

The constitutional precedents forming the foundation of the Tennessee Supreme Court's decision were gleaned from decisions

of this Court involving individuals' religiously motivated actions which took place in secular contexts. But even if the settings in which the questioned actions in earlier cases took place differ from the circumstances of this case, their motivation is still spiritually derived, and so there constitutional protection is still based upon the First Amendment of the United States Constitution. Just as this Court has determined that the First Amendment freedoms of religion are not limited to acts taking place in a religious context, so should this Court decline to narrow its long standing precedents so that they only apply to actions taking place in secular contexts. A religiously motivated act that is detrimental to the welfare of society will not be rendered less detrimental because it takes place in a church rather than a park or street.

II

There Is No Reasonable Expectation of Privacy Surrounding Religiously Motivated Acts Performed in Public.

The petitioners also claim that one of their penumbral First Amendment rights, their right of privacy, insulates their religiously motivated actions from regulation by the State. To adopt this reasoning would be to greatly expand the scope of an individual's constitutionally protected zone of privacy. This Court has found that the right of privacy applies to a person's activities in the privacy of his own home, *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248 (1967) and to the intimate relationships stemming from activities relating to marriage. *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727 (1973). While the petitioners' assertion in this case would have more force if the record showed the petitioners handling poisonous snakes in the privacy of their own home, the fact that the petitioners' activities usually take place in a crowded church during ceremonies commonly attended by the public and

are apparently motivated by some evangelical purpose shows that the petitioners have no real expectation of privacy concerning their actions and, in fact, desire none.

In *Roe v. Wade, supra,* this Court recognized that the right of privacy was not wholly immune from regulation when important state interests are involved. The context of the abortion question, this Court ultimately concluded that the interests of the mother would, at a certain point in time, be outweighed by the interests of the unborn child as well as the State's interest in preserving the health of the mother. By so holding, this Court has recognized that in certain situations, the interests of society will justify interference with an individual's actions, even when these actions are directed primarily against the individual himself.

This same rationale was adopted by the Tennessee Supreme Court in this case and has been consistently adopted by other federal courts that have been called upon to balance an individual's religiously motivated actions with their adverse effects on others. *In re President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (D.C. Cir.), *reh. denied en banc,* 331 F.2d 1010 (D.C. Cir.), *cert. denied,* 377 U.S. 978, 84 S.Ct. 1883 (1964).

CONCLUSION

The First Amendment issues raised in this case are merely questions of the application of long recognized constitutional principles to a fact situation never before considered by this Court because of the unique and isolated nature of the religious practice involved. The fact that Tennessee has chosen to protect the fundamental interests of its citizens by using a civil remedy rather than a criminal one does not amount to a significant expansion of the authority of the State to interfere with

the actions of its citizens when society's interests require such interference. An individual's actions, even when they are religiously motivated and personally directed, are still subject to reasonable regulation by the state if they adversely affect the health, safety or welfare of society. Thus for the reasons stated herein, the State of Tennessee respectfully submits that this petition for a writ of certiorari be denied.

Respectfully submitted

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